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No. 79-1713

IN THE

Supreme Court of the United States

October Term, 1979

RED LAKE BAND OF CHIPPEWA INDIANS,
Petitioner,

vs.

STATE OF MINNESOTA and COUNTIES OF ROSEAU, PENNINGTON, MARSHALL, RED LAKE, POLK, CLEARWATER, BELTRAMI, LAKE OF THE WOODS, and KOOCHICHING,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT STATE OF MINNESOTA IN OPPOSITION TO PETITION FOR CERTIORARI

WARREN SPANNAUS
Attorney General
State of Minnesota
JAMES M. SCHOESSLER
Special Assistant
Attorney General
Box 38 Centennial Bldg.
St. Paul, Minn. 55155
Telephone: (612) 296-3294
Counsel for Respondent
State of Minnesota

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TABLE OF CONTENTS

	Page
Question Presented	2
Statement of the Case	2
Reasons for Denying the Writ	5
I. The Decisions of the District Court and Court of Appeals Accurately Reflect the Factual Circumstances Surrounding the Red Lake Cessions, and it is Possible to Reconcile the Decisions with Other Decisions in the Federal District Court and Minnesota Supreme Court Relating to Other Reservations	5
II. The Decisions of the District Court and Court of Appeals Are Consistent With the Relevant Decisions of the United States Supreme Court	9
Conclusion	10

TABLE OF AUTHORITIES

Page

Statutes and Treaties:

Act of January 14, 1889 (Nelson Act), 25 Stat. 642, I Kappler 301 ..... 3, 6, 7

Act of February 20, 1904, 33 Stat. 46, III Kappler 28 3

Act of June 18, 1934 (Wheeler-Howard Act or Indian Reorganization Act), 48 Stat. 984, as amended, 25 U.S.C. § 463 ..... 2, 3, 4

Federal Decisions:

DeCoteau v. District County Court, 420 U.S. 425 (1975) 8, 9

Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971) 6, 8

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 8, 9

State of Minnesota v. Clark, 282 N.W.2d 902 (Minn. 1979), *cert. den.* —— U.S. ——, 100 S.Ct. 1080 (1980) 5, 6, 7, 8

State of Minnestoa v. Forge, 262 N.W.2d 341 (Minn. 1977), *appeal dismissed,* 435 U.S. 919 (1978) 6, 7, 8

United States v. Minnesota, 466 F.Supp 1382 (D. Minn. 1979), *aff'd per curium sub. nom. Red Lake Band of Chippewa Indians v. Minnesota,* No. 79-1420 (8th Cir., filed Jan. 31, 1980) 5, 7

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The respondent State of Minnesota respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case.

QUESTION PRESENTED

After the Red Lake Band of Chippewa Indians ceded territory to the United States in 1889 and 1904, did any special Indian hunting and fishing rights survive in the ceded land?

STATEMENT OF THE CASE

In this action the Red Lake Band of Chippewa Indians sought to enjoin the State of Minnesota from enforcing its game and fish laws against members of the Band within an area of approximately 2.6 million acres *outside* the boundaries of what is recognized as the present Red Lake Indian Reservation.[1] The action was tried before the United States District Court on the basis of a very extensive set of stipulated documents and facts. Chief Judge Edward J. Devitt issued an opinion on March 28, 1979 (466 F. Supp. 1382) in which he determined that the land in question had been fully and completely ceded to the United States, and that no special hunting or fishing rights remained thereon. The United States Court of Appeals for the Eighth Circuit affirmed *per curiam* the district court judgment on January 31, 1980.[2]

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[1] The Red Lake Reservation is a contiguous block of land consisting of approximately 543,000 acres, virtually all of which is owned in trust for the Band. Additionally, certain widely scattered parcels outside the contiguous reservation were restored to reservation status pursuant to sections 3 and 7 of the Wheeler-Howard Act, 48 Stat. 984 as amended, 25 U.S.C. § 463. There are about 160,000 acres of these lands.

[2] The United States initiated this action in U.S. District Court on behalf of the Red Lake Band. Although the United States filed a notice of appeal after the district court ruling, the government later asked the court of appeals to dismiss the appeal. At that point the Red Lake Band itself asked to be substituted for the United States as appellant. The court of appeals allowed the substitution. After the United States withdrew as appellant, it did not participate any further in the case, either with written submissions or oral argument.

The land on which the Band seeks hunting and fishing rights encompasses approximately 2.6 million acres surrounding the present reservation and extending north and east to the Canadian border. The land in dispute is that land which was ceded by the Red Lake Band to the United States in 1889 and 1904. The 1889 cession took place pursuant to the so-called Nelson Act (25 Stat. 642, I Kappler 301) and involved 2.4 million acres. The 1904 cession, involving another 256,000 acres, was accomplished by an Act of Congress of February 20, 1904 (33 Stat. 46, II Kappler 28).

The language of cession was virtually identical in both cession documents. The 1889 Agreement with the Red Lake Band states that the Indians "*do hereby grant, cede, relinquish and convey to the United States all our right, title, and interest in and to. . . .*" the 2.4 million acres (emphasis added). The 1904 Act states that the Indians "*do hereby cede, surrender, grant and convey to the United States all their claim, right, title, and interest in and to . . .*" the 256,000 acres (emphasis added).

After these two cessions the Band retained a contiguous block of approximately 543,000 acres, the land that is currently considered to be the Diminished Red Lake Reservation.[3] There was no provision in either cession document which preserved hunting and fishing rights in any form in the ceded land; indeed, no mention was made at all to hunting and fishing.

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[3] As mentioned in n. 1, *supra*, an additional 160,000 acres of widely scattered parcels outside the Diminished Reservation were returned to reservation status under the terms of the Wheeler-Howard Act, 48 Stat. 984 as amended, 25 U.S.C. § 463.

There is no controversy in this case about the ability of Band members to hunt and fish free of state game laws on either the Diminished Reservation or the lands restored to reservation status pursuant to sections 3 and 7 of the Wheeler-Howard Act. The State of Minnesota has long agreed that in those areas Band members may hunt and fish free of state regulation.

The controversy in this case focuses rather on a huge area (the 2.6 million acres ceded in 1889 and 1904) *in addition* to the 543,000 acre Diminished Reservation and 160,000 acres of restored lands on which the State already recognizes Band hunting and fishing rights. The area in which hunting and fishing rights are now sought by the Band currently is overwhelmingly non-Indian in population and character,[4] in sharp contrast to the situation within the Diminished Reservation.[5]

Additionally, it is not disputed that since the 1889 and 1904 cessions the State has exercised full jurisdiction over Indians in the ceded territory (except on the Wheeler-Howard lands). Until the present litigation was started, the United States itself acknowledged and acquiesced to the State's exercise of jurisdiction.

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[4] The non-Indian population in the areas ceded in 1889 and 1904 is 17,700; the Indian population is 170. The lands restored under the Wheeler-Howard Act constitute only 6.2% of the ceded area; the remaining land is owned in fee by individuals, by the State, and even by the federal government free from any trust in favor of the Indians.

[5] The Diminished Reservation has a population of 2,800 Indians and 200 non-Indians. The land is almost entirely owned in common by the Red Lake Band.

REASONS FOR DENYING THE WRIT

I. THE DECISIONS OF THE DISTRICT COURT AND COURT OF APPEALS ACCURATELY REFLECT THE FACTUAL CIRCUMSTANCES SURROUNDING THE RED LAKE CESSIONS, AND IT IS POSSIBLE TO RECONCILE THE DECISIONS WITH OTHER DECISIONS IN THE FEDERAL DISTRICT COURT AND MINNESOTA SUPREME COURT RELATING TO OTHER RESERVATIONS.

The decisions of the district court and court of appeals in the case were made on the basis of a voluminous set of exhibits, a comprehensive factual stipulation, and extensive briefing. The courts followed the dictates of this Court for interpreting treaties and agreements. The district court's analysis closely followed its own preliminary statement that:

> To determine the intent of Congress and understanding of the Indians, the court must analyze the wording of the treaties, agreements, and enactments, the prior history, the surrounding circumstances, and the subsequent construction given those documents by the parties.

United States v. Minnesota, 466 F. Supp. 1382, 1385 (1979). The Red Lake Band made no attempt to show in the court of appeals, and makes no allegation in its petition for certiorari, that the detailed factual and historical analysis of the district court was in error.

Rather, the Band argues that the courts' treatment in this case of the effects of the 1889 and 1904 cessions was inconsistent with three other federal and state court cases dealing with other agreements in other reservations: *State of Minnesota v. Clark*, 282 N.W.2d 902 (Minn. 1979) *cert. den.* —— U.S.

——, 100 S.Ct. 1080 (1980); *State of Minnesota v. Forge*, 262 N.W.2d 341 (Minn. 1978), *appeal dismissed* 435 U.S. 919 (1978); and *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001 (D. Minn. 1971). This argument is not a valid basis for granting certiorari for two basic reasons. First, the cases cited by petitioner are not factually identical to the Red Lake case. Secondly, it is possible to reconcile those cases with the present decisions.

It is fundamental that every treaty or agreement has to be analyzed on its own particular facts. The Red Lake facts are not identical to those relating to the White Earth Band (addressed in *State of Minnesota v. Clark*) and the Leech Lake Band (addressed in *Leech Lake Band of Chippewa Indians v. Herbst* and *State of Minnesota v. Forge*). In the absence of a showing that the analysis of the lower courts in the present case is in error, the unexplained citations to earlier unrelated cases are of little weight.

Additionally, with regard to the *Clark* case (and therefore *Forge*, on which *Clark* relied), the Minnesota Supreme Court's ruling regarding the effect and intent of the Nelson Act can be reconciled (although not without some ambiguity) with the decision in the present Red Lake cession case. The issue in the *Clark* case involved a Nelson Act agreement which provided for the outright cession of four townships of land, but *reserved from the cession thirty-two other townships for the sole purpose of making allotments*. The hunting and fishing violations in *Clark* all took place within the thirty-two townships reserved for allotments. The Minnesota Supreme Court decided that the intent of the Nelson Act was not to disestablish those thirty-two townships as a reservation. The State of Minnesota disagrees with that decision, but nevertheless that is the present opinion of the court.

However, the Minnesota Supreme Court did not rule on the effect of the outright cession of four townships in the Nelson Act agreement.[6] In fact, in its opinion the Minnesota Supreme Court implied that it would interpret the Nelson Act differently with regard to territory ceded outright. In this context the court actually cited with approval Chief Judge Devitt's analysis in the present case relating to outright land cessions and the loss of hunting and fishing rights.[7]

It is true that the Minnesota Supreme Court in its opinion (as well as in the prior opinion of *State of Minnesota v. Forge*, 262 N.W.2d 341 (Minn. 1977) which the court found controlling) made some general statements about the intent of the Nelson Act, at least as it related to the termination of the entire White Earth and Leech Lake Reservations. The State believes the statements to be in error. It is precisely because of the court's general statements, and the confusion they could create, that the State of Minnesota sought certiorari in the *Clark* case. This Court, however, decided not to grant certiorari there, and certiorari was denied February 25, 1980, *State of Minnesota v. Clark*, —— U.S. ——, 100 S.Ct. 1080. Although the State still believes the confusion created by the

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[6] The court stated: "Also pursuant to the Nelson Act, the Indians ceded outright four townships containing valuable pine preserves to the United States. Our decision in this case applies only to land lying within the 32 townships of the White Earth Indian Reservation remaining after the 1889 cession. The other four indicated townships are therefore not significant to this decision." 282 N.W.2d at 906, n. 13.

[7] The court referred to an 1855 treaty with the Chippewas in which the Indians had agreed to "cede, sell, and convey to the United States all their right, title, and interest in and to" certain lands. The court said: "As recognized by Judge Devitt in *United States v. Minnesota, supra*, this language of cession abrogates all aboriginal hunting and fishing rights. Nor have the Chippewas advanced a claim that they were orally promised continued hunting and fishing rights in the ceded area. *See, United States v. Minnesota, supra.* Thus, we necessarily conclude that the 1855 treaty extinguished their aboriginal hunting and fishing rights in the area in question." 282 N.W.2d at 908, n. 16.

Clark decision to be troublesome, if certiorari was not granted in *Clark*, it should not be granted here. It is possible to reconcile the *Clark* holding with the holding in the present case, if *Clark* is construed narrowly as only interpreting the intent of the Nelson Act as it related to thirty-two townships of land on the White Earth Reservation.

The Red Lake Band also urges that certiorari be granted on the basis of a conflict with *Leech Lake Band of Indians v. Herbst*, 334 F. Supp. 1001 (D. Minn. 1971). Conflict with a district court decision issued almost nine years earlier is hardly grounds for granting certiorari. Additionally, as in the case of *Clark* and the White Earth Reservation, the facts of *Leech Lake* are not the same as the facts in *Red Lake*. Furthermore, *Leech Lake* was decided by the same judge, Chief Judge Devitt, who decided the present case. Apparently, either Judge Devitt found no conflict between his own reasoning in the two cases, or he felt that additional intervening supreme court precedents such as *Rosebud*[8] and *DeCoteau*[9] required a different result. In either case, *Leech Lake* provides no basis for the granting of certiorari here.

In summary, the decisions in *Clark*, *Forge* and *Leech Lake* do not justify the granting of certiorari in this case. There may be ambiguities in the *dicta* of various courts which have tried to generalize about the Nelson Act, but those ambiguities do not necessarily require the granting of certiorari. If they did not require the granting of certiorari in *State of Minnesota v. Clark*, —— U.S. ——, 100 S.Ct. 1080 (1980), they do not justify the granting of certiorari in this case.

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[8] *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 485 (1977).
[9] *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

II. THE DECISIONS OF THE DISTRICT COURT AND COURT OF APPEALS ARE CONSISTENT WITH THE RELEVANT DECISIONS OF THE UNITED STATES SUPREME COURT.

Although the Red Lake Band alleges a conflict with this Court's opinions in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) and *DeCoteau v. District County Court*, 420 U.S. 425 (1975), it is apparent from reading the district court opinion that such a conflict does not exist. The *Rosebud* and *DeCoteau* cases in particular are cited, discussed, and relied upon by the district court. The *Rosebud* decision is especially analogous to the Red Lake situation. The Band's argument that its reservation was not diminished in 1889 and 1904 because the method of payment to the Band for ceded land was not a sum certain,[10] flies directly in the face of the *Rosebud* decision. There this Court held that agreements by which ceded land was sold and the money turned over to the Indians could diminish or disestablish reservations in the same manner as sum-certain cession agreements. *See* 430 U.S. at 587-588, 592-598.

The Red Lake Band's attempt to create a conflict with controlling Supreme Court precedent does not withstand scrutiny.

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[10] Lands were to be sold by the United States and the proceeds turned over to the Band.

CONCLUSION

The decision of the district court in this matter, as affirmed *per curium* by the court of appeals, was correctly made. It does not conflict with precedent from this Court, but rather is fully consistent with that precedent. The decision can also be interpreted in a manner which is reconcilable with state court decisions and other lower federal court decisions on similar, but not analogous, subject matter. Therefore, certiorari should be denied.

Dated: May, 1980.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota
JAMES M. SCHOESSLER
Special Assistant
Attorney General
Box 38 Centennial Bldg.
St. Paul, Minn. 55155
Counsel for Respondent
State of Minnesota